82-104

No.

FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioner,

VS.

MARY BRUG,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the conduct of the Pension Plan of the Carpenters Pension Trust Fund for Northern California in denying a pension to Plaintiff Mary Brug was arbitrary, capricious, made in bad faith, not supported by substantial evidence or erroneous on a question of law.

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Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

Pension Plan of the Carpenters Pension Trust Fund for Northern California respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 12, 1982.

I

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 669 F.2d 570. That Court's order denying Petitioner's petition for rehearing and rejecting Petitioner's suggestion for a rehearing *en banc* (Appendix C, *infra*) was filed on April 16, 1982. The order and judgment of the United States District Court for the Northern District of California (Appendix B, *infra*) was entered on June 9, 1980, and is not reported.

II

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 12, 1982. A timely petition for rehearing and suggestion for a rehearing *en banc* was filed on February 26, 1982. On April 16, 1982, the petition for rehearing was denied and the suggestion for a rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

III

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Employee Retirement Income Security Act, Section 404, 29 U.S.C. § 1104;
2. Labor Management Relations Act of 1947, Section 302, 29 U.S.C. Section 186.

Pertinent portions of these statutory provisions are reproduced at Appendix D, *infra*.

IV

STATEMENT OF THE CASE

Mary Brug (hereinafter "Brug") filed this action on December 1, 1976, naming the Pension Plan of the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Plan"), the Trustees of the Carpenters Pension Trust Fund for Northern California (hereinafter "Trustees") and Carpenters Local Union No. 22 (hereinafter "Local 22") as defendants. In her complaint, Brug alleged that by denying her application for a pension, the Trustees and the Pension Plan violated the governing instruments of the Pension Plan and the fiduciary obligations set forth in the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (hereinafter "ERISA"), and acted arbitrarily, discriminatorily and capriciously. Federal jurisdiction was predicated upon Sections 502(a)(1)(B) and 502(e)(1) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and 1132 (e)(1).

On October 14, 1977, Brug filed a motion for summary judgment, and Defendants thereafter filed cross-motions for summary judgment. On November 21, 1977, Local 22's cross-motion for summary judgment was granted and Local 22 was dismissed as a party defendant. On January 19, 1978, the District Court denied Brug's motion for summary judgment. The Trustees' cross-motion for summary judgment was granted and the Trustees were dismissed from the action. After further discovery, Brug renewed her motion for summary judgment. On March 22, 1978, the District Court denied the renewed motion for summary judgment.

Pursuant to leave of court, Brug filed a First Amended Complaint for Declaratory Judgment, Damages and In-

junction on August 27, 1979. In her first amended complaint, which named the Pension Plan as the sole defendant, Brug alleged that the denial of her application for a pension was arbitrary, discriminatory and capricious and in violation of the governing instruments of the Pension Plan and of Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).[1]

On March 26, 27 and 28, 1980, the case was tried by The Honorable Richard M. Bilby, United States District Judge. On June 9, 1980, the District Court issued an order denying Brug's claims for relief in their entirety. Judgment was entered the same day. In its order, the District Court found that the decision of the Board of Trustees of the CPTF was not arbitrary, capricious, made in bad faith, unsupported by substantial evidence or erroneous on a question of law. Therefore, the District Court held that the decision of the Board of Trustees should not be reversed.

On June 18, 1980, Brug filed a Notice of Appeal.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit in December, 1981. On February 12, 1982, the panel issued an opinion reversing the judgment of the District Court. The panel held that the action of the Trustees in denying Brug's pension application was arbitrary and capricious.

A petition for rehearing and a suggestion for a rehearing *en banc* were timely filed. The panel issued an order on April 16, 1982, denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*.

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[1]Brug also alleged that the Pension Plan was estopped by the representations of an agent of the Carpenters Pension Trust Fund for Northern California from denying Brug's right to a pension. Brug abandoned her equitable estoppel claim prior to the trial of this action.

V

STATEMENT OF FACTS

The Carpenters Pension Trust Fund for Northern California (hereinafter "CPTF") was created in 1958 as the result of collective bargaining negotiations between representatives of certain construction contractor employers and representatives of the United Brotherhood of Carpenters. As part of the collective bargaining agreement executed that year, the signatory participating employers agreed to make contributions to a trust fund on behalf of their employees on the basis of the number of hours worked by individual carpenters and piledrivers in the trade.

The Trustors of the CPTF—that is, the employers and the labor organizations which negotiated the agreement establishing the CPTF (hereinafter "Trust Agreement")—intended the CPTF to provide benefits *only* for carpenters and piledrivers in the trade who were employed by construction contractor employers which made contributions into the CPTF pursuant to the collective bargaining agreements they had signed with the union. The Trustors never intended the CPTF to provide benefits for office clerical employees like Brug. The Recitals in the Trust Agreement as well as the list of parties to the Trust Agreement indicate that this agreement between construction industry contractors and the carpenters union was entered into on behalf of carpenters and piledrivers only.

In 1965, the definitions of "Individual Employer," "Employee" and "Contribution" in the Trust Agreement were amended to include coverage for carpenters and piledrivers who were selected to be representatives or officers of their unions. A prerequisite for such office in the participatory labor organizations is that the official or representative must have been a carpenter or piledriver in the trade. The amendments in question designated the labor

unions involved as employers, and their representatives and officers as employees. These employees were brought under the Pension Plan's coverage so that carpenters and piledrivers who at some point in their working careers became officers and/or representatives of the union would not risk losing their accumulated pension credits while serving in the employ of the union. These 1965 amendments were not intended by the Trustors to include office clerical employees of local unions as people who would receive pensions from the CPTF.

Until 1975, Brug, as a clerical employee in the office of Carpenters Union Local 22, never had any reason to take notice of the existence of the CPTF. That is, she was not employed by a participating construction contractor, nor was she a carpenter in the trade. Brug was an office clerical employee, officially classified as a stenographer in the local union's office. As a member of Office and Professional Employees Union (hereinafter "OPEU"), Local 3, she was subject to the terms of a collective bargaining agreement between that labor organization and her employer, Carpenters Union Local 22. This agreement provided that her employer, Local 22, make contributions on her behalf to the Office and Professional Employees Pension Trust Fund (hereinafter "OPE Pension Trust Fund").

In 1975, the Internal Revenue Service conducted a regularly scheduled audit of the Carpenters Union (as an employer) and the CPTF. The Internal Revenue Service report suggested that a disparity between benefits received by clerical employees of Local 22 from the OPE Pension Trust Fund and benefits received by carpenters employed as officers of Local 22 under the terms of the CPTF might affect the tax exempt status of the CPTF if allowed to continue unremedied.[2]

[2]The Internal Revenue Service later revised its stance and decided that this disparity would not affect the tax exempt status of the CPTF.

As a result of the Internal Revenue Service report, the Trustees of the CPTF erroneously thought that the carpenters employed as officers of Local 22 would have their long-standing pensions under the CPTF negatively affected if the aforesaid disparity was not rectified. Therefore, the Trustees of the CPTF erroneously and unlawfully passed Amendment 13 to the Pension Plan solely for the protection of the carpenter officers of Local 22. This amendment, which was adopted by the Board of Trustees on August 26, 1975, permitted Local 22 to purchase a pension for Mary Brug for the mere payment of approximately $600 to the CPTF in order to secure protection for the carpenter officers.

Sometime in the summer or fall of 1975, Brug learned that she might be eligible for benefits under the CPTF. In the early fall of that year, Brug suffered a nervous breakdown and ceased working for Local 22.

On November 13, 1975, Brug applied for an early retirement pension from the Pension Plan. Michael Pearce of the CPTF did a preliminary analysis of her request and indicated that at that point in time it appeared that she met the requirements of the Pension Plan. On November 17, 1975, however, Pearce notified Brug through Local 22 that she did not, in fact, qualify for the pension for which she had applied. Brug was informed that because she did not have sufficient years of service and was not yet 65 years of age, she did not qualify for the standard pension benefits. Pearce told Brug that she might qualify, however, for a Carpenters disability pension provided she first applied for and qualified for Social Security total disability benefits.[3] Accordingly, on or about November 19,

[3]As found by the District Court, Michael Pearce had no authority to speak on behalf of the Pension Plan regarding the granting or denying of benefits. Only the full Board of Trustees has authority to make such pronouncements. Pearce merely makes recommendations to the Pension Approval Committee, which in turn must forward its recommendations to the full Board for decision.

1975, Brug applied for total disability benefits from the Social Security Administration. The benefits were awarded to her on or about February 10, 1976. This information was relayed to Michael Pearce who informed Brug that her pension application had to be ruled on by the Pension Approval Committee.

During this period of time, Brug applied for and was awarded pension benefits from the OPE Pension Trust Fund under the agreement between her employer, Carpenters Union Local 22, and her union, OPEU, Local 3.

In this interim period between the passage of Amendment 13 and Brug's application for pension benefits, union employers made contributions to the CPTF on behalf of office clerical employees retroactive to June 1, 1975. Following the adoption of Amendment 13, five office clerical employees of various union locals applied for and were granted retirement benefits under the Pension Plan, despite the fact that they were thereby obtaining lifelong pensions of from $255.00 to $600.00 per month supported by contributions from union employers totalling only $800.00 to $1,200.00. The rights of these former clerical employees are not at issue in this suit. They are presently receiving pensions from the CPTF.

Almost immediately after the adoption of Amendment 13, the Trustees of the CPTF began receiving complaints from various individuals regarding the perceived inequity of denying pension benefits to carpenters who had worked in the industry for a number of years, while affording them to office clerical employees who had been covered for only a matter of months. These complaints and criticisms continued throughout the period subsequent to the passage of Amendment 13, and the Pension Plan was

actually threatened with a class action lawsuit based on this amendment. Therefore, the Trustees almost immediately began considering modifying or, alternatively, rescinding Amendment 13. Their consideration of the matter culminated in the events of March, 1976.

On March 16, 1976, the regularly scheduled meeting of the Pension Approval Committee took place. At this meeting, the Committee considered a number of pension applications before it on the agenda. The members of the Committee knew at the time of this meeting that a major policy decision was facing the Board of Trustees, the only body constituted to rule on policy matters for the Pension Plan: the question of whether Amendment 13's provision for eligibility for clerical employees should be continued. Accordingly, the Pension Approval Committee deferred making a recommendation upon the application of Brug until that policy decision had been made.

The full Board of Trustees met to consider the matter on March 23, 1976. Prior to that occasion, the Trustees were advised by counsel that the provisions of Amendment 13 were unlawful. Accordingly, the Trustees voted not to accept any further contributions on behalf of clerical employees, to refund contributions that had been thitherto made, and to advise contributing union employers that clerical employees could not be covered under the Pension Plan. Pursuant, however, to advice of counsel that the Pension Plan was estopped from challenging the pensions of the office clerical employees who had already been granted benefits, the Trustees voted not to attempt to rescind those benefits. Immediately after this meeting of the full Board of Trustees, the Pension Approval Committee reconvened. Because the Board of Trustees had voted to rescind Amendment 13, the Pension Approval Committee voted to deny Brug's pension application.

On March 29, 1976, Brug received notification of the Pension Approval Committee's action. She was informed that the Trustees were reconsidering whether or not clerical employees were to be included in the Pension Plan's coverage. Thereafter, in May, 1976, the Trustees took the formal step of rescinding Amendment 13. All contributions which had been made by Brug's employer on her behalf were thereafter refunded by the CPTF.

VI

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Decision of the Court of Appeals Is in Conflict with Both This Court's Decision in Arroyo v. United States, 359 U.S. 419 (1959), and the Decision of a State Court of Last Resort Concerning the Limitations Imposed by Section 302(c)(5) of the Labor Management Relations Act of 1947 Upon the Discretion of Trustees of Jointly Administered Pension Trust Funds

The CPTF is a jointly administered pension trust fund established under the authority of Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 *et seq.* (hereinafter "LMRA")[4]. This Court has stated in no uncertain terms that the trustees of a Section 302(c)(5) jointly administered pension trust fund may not expend the assets of such a fund for purposes other than those for which the fund was established. *Arroyo v. United States*, 359 U.S. 419, 426 (1959). That is, the trustees have no power or authority to alter, change or modify a trust instrument by unilateral act, without the concurrence of the trustors—the signatory labor unions and employer associations. *French v. Construction Laborers Pension Trust*

[4]A verbatim text of Section 302(c)(5), 29 U.S.C. § 186(c)(5), is attached to this Petition at Appendix D.

For Southern California, 44 Cal.App.3d 479, 489 (1975). *See also Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969). In *Arroyo*, this Court explicitly set forth the limits of the powers of such trustees:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." 359 U.S. at 426.

This principle was closely followed in a well-reasoned opinion in a case similar to the instant one. A California Appellate Court,[8] applying federal labor law pursuant to its concurrent jurisdiction over such matters, held that trustees of a Section 302(c)(5) jointly administered pension trust fund may not go beyond the bounds of the original trust agreement created by the collective bargaining parties, or trustors. *French v. Construction Laborers Pension Trust Fund For Southern California*, 44 Cal.App.3d 479 (1975). In the *French* case, plaintiffs had contributed into the defendant pension trust fund for several years, retired, applied for pensions, and in fact received pension benefits. Then the defendant pension trust fund discovered that although contributions had been made on the plaintiffs' behalf by their employer, they had not been working for an

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[8]Since both a petition for a rehearing and a petition for a hearing by the California Supreme Court were denied (*French*, 44 Cal.App. 3d at 493), the California Appellate Court in *French* is "a state court of last resort."

employer who had signed the collective bargaining agreement calling for such payments to be made. The defendant pension trust fund therefore ceased making pension benefit payments to the plaintiffs and demanded that the plaintiffs return all payments which they had previously received. The court pointed out that the trust agreement indicated that only employers who were signatory to a certain collective bargaining agreement could make contributions on behalf of their employees and that only such "covered" employees could be granted pensions. Since the employer of the plaintiffs had not signed the appropriate collective bargaining agreement at the appropriate time, granting pensions to these employees went beyond the terms of the trust agreement and the trustees would . e been acting beyond their authority as set forth in the trust agreement if they had continued to make pension payments to the plaintiffs. As a result, the court decided the case in favor of the defendant pension trust fund. The court stated:

> "The Trustees of such a trust had no power or authority to alter, change, or modify such trust instrument by unilateral act without the concurrence of the Trustors—the signatory labor unions and employer associations. If the Trustees were guilty of wrongdoing in their dealings with third persons (M & M) (we do not conclude that they were) which resulted in damage to such third persons, the Trustees may or may not have personal liability to such third person but the Trustees may not effect what amounts to an amendment of the trust agreement relating to qualifications for membership by unilateral act even though it may be characterized as a waiver or estoppel. In *Moglia v. Geoghegan* (S.D. N.Y. 1967) 267 F.Supp. 641, affd. (2d Cir. 1968) 403 F.2d 110, the Trustees of a pension trust established under the Taft-Hartley Act refused a pension to a widow of an alleged 'em-

ployee' whose employer had failed to make contributions to the trust. Under the trust definition of employees the widow's husband was not an employee. The widow argued that the trust and law should be interpreted to protect 'employees.' The court pointed out that the trustee owed duties to the beneficiaries of the trust and that it could not jeopardize their rights by, in effect, changing the terms of the trust to include people not eligible, that even if the employer had made contributions on behalf of the husband and the trustees acting in a grossly negligent manner had accepted them, that such conduct could not change the trust instrument and extend coverage to people not covered." *French*, 44 Cal.App.3d at 489.

In this respect, Section 302(c)(5) jointly administered trust funds are just like any other trusts. That is, the trust*ors* set forth the terms of the trust and their intentions in a formal trust agreement, which serves as the trust document pursuant to which the trust*ees*, who are appointed to manage the trust, will administer the trust. That trust agreement is a document created by the trust*ors* which may be amended, modified or changed only by the trust*ors* or their successors. The pension plan, on the other hand, is a set of rules and regulations which the trust*ees* pass, pursuant to the powers granted to them by the trust*ors* in the trust agreement. Thus, the trust agreement is the governing document since it is signed by the trust*ors*, while the pension plan is a set of subordinate rules and regulations which are drafted by the trust*ees*, who must at all times act only within the scope of authority given to them by the trust*ors* in the trust agreement.[6]

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[6]This distinction is absolutely crucial since Plaintiff Brug seems to base her entire claim on the Pension Plan, a set of rules and regulations drafted by the Trustees, without realizing that the

Applying these principles of law to the case at hand is a simple and straightforward matter, despite the complexity of the facts. As discussed *supra*, the Trust Agreement did not and does not allow the Trustees to grant pensions to office clerical employees who are members of OPEU Local 3 and have never been carpenters or piledrivers. Prior to 1965, there would have been no confusion whatsoever concerning this matter. The confusion introduced in this case is a result of the 1965 amendments to the Trust Agreement. However, it was never the intent or express declaration of the Trust*ors* to include anyone other than carpenters and piledrivers. The 1965 amendments to the Trust Agreement were intended to include only employees of the union locals and district councils who had been in and might return to the trade of carpenter or piledriver. These amendments were passed in order to insure that carpenters and piledrivers, who were elected to positions in their unions and temporarily moved out of employment for participating construction contractors and into employment for the union, would not incur a "break-in-service" which would adversely affect their pension eligibility.

Because the Internal Revenue Service audit suggested that the CPTF might have tax-related problems as a result of the disparity between the size of the OPE pension and the Carpenters pension, the Trustees passed Amendment 13 to the Pension Plan based on the assumption that the 1965 amendments to the Trust Agreement gave them sufficient authority. However, prior to granting a pension to Brug, the Trustees reconsidered this matter and were ad-

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document which truly governs the CPTF is the Trust Agreement itself, since it is the document drafted and agreed to by the Trust*ors*. The Trust Agreement sets forth the powers, duties and authorities of the Trustees, while the Pension Plan is simply a set of rules and regulations setting forth the terms under which various benefits are to be paid.

vised by their counsel and their consultants that Amendment 13, if perpetuated, would give a group of people, who were not "covered" employees within the meaning of the Trust Agreement and were not within the collective bargaining unit of the agreement giving rise to the CPTF, a lifetime pension for the price of approximately $600, while thousands of carpenters had been denied pensions because they missed, for example, 1/12 of a credit needed for vesting after having contributions made on their behalf for almost 10 years. The counsel and consultants emphasized that the Trust Agreement was not intended to give the Trustees authority to award pensions to office clerical employees who had never been and never would be carpenters or piledrivers. Informed of the original intent of the Trust*ors*, the Trustees of the CPTF rescinded Amendment 13 and, only then, denied Brug's application for a pension.

Thus, the Trustees went beyond the scope of their authority as set forth in the Trust Agreement only when they adopted Amendment 13 to the Pension Plan, which stated that office clerical employees would be "covered." However, in March, 1976, when they were informed by counsel and consultants that the real intent of the Trust*ors* was to cover only carpenters and piledrivers, even when they were temporarily employed by their unions, the Trustees rescinded Amendment 13 so that they would be acting within the scope of their authority as set forth by the Trust*ors*. Moreover, the Trust Agreement limited the power of the Trustees so that they did not even have the legal authority to grant a pension to Brug, since she was not meant to be included as a potential participant by the Trust*ors*.

The only act of the Trustees which arguably might have been incorrect was to pass Amendment 13 in the first place. However, as soon as they realized the error they had made, they acted as reasonably, carefully and

in good faith as possible, by rescinding Amendment 13 and refusing to give it any effect. The Trustees were thus acting within the scope of their authority as set forth by the Trustors in the Trust Agreement.

Plaintiff Brug cannot invoke the doctrine of estoppel to compel the Trustees to award her pension benefits. The Ninth Circuit has held that the federal law of estoppel may not be applied to compel a Section 302(c)(5) pension trust fund to pay benefits to someone determined to be ineligible under the provisions of the trust agreement. *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1266-67 (9th Cir. 1979).

In addition, the Trustees herein would act contrary to the fiduciary standard set forth in ERISA if they were to grant a pension to Brug. Section 404(a)(1) of ERISA provides, in part, that:

> "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . ."
>
> 29 U.S.C. § 1104(a)(1).

Thus, ERISA also requires trustees to act in accordance with the trust documents in carrying out their fiduciary obligations. The Trustees herein have a fiduciary relationship to all the carpenters and piledrivers for whom contributions have been made into the CPTF. If the Trustees were to grant a pension to an office clerical employee like Brug, any potential participant in the CPTF or any participant now receiving a pension could sue the Trustees on the ground that they had breached their fiduciary duty

to act solely in the interest of the participants and beneficiaries and "in accordance with the documents and instruments governing the plan". In other words, it would be a breach of fiduciary duty to the carpenters and piledrivers to grant a pension to Brug.

Consequently, the decision of the Court of Appeals that the Trustees' denial of Brug's pension application was unlawful is in conflict with both this Court's decision in *Arroyo* and the decision of the California Appellate Court in *French*. We submit that the granting of the pension to Brug under the circumstances of this case is tantamount to the spending of trust assets without proper authority. To continue to require this action on the part of the Trustees is, in effect, a direct violation of the provisions of the Trust Agreement, Section 404(a)(1) of ERISA and Section 302(c)(5) of the LMRA, which cannot be allowed to stand.

B. The Decision of the Court of Appeals Is in Conflict With Established Case Law in the Eighth, Tenth and District of Columbia Circuits, and with Prior Case Law in the Ninth Circuit Concerning the Trustees' Discretion to Choose Between Two Reasonable Alternatives

Even assuming *arguendo* that the language of the Trust Agreement is not unambiguous with regard to coverage of a local union's clerical employees and that Brug's interpretation of the Trust Agreement is reasonable, the Trustees' decision denying Brug's pension application must nevertheless be upheld since the Trustees' interpretation of the Trust Agreement (i.e., that it does not cover a local union's clerical employees) is also reasonable. *Lowenstern v. International Association of Machinists and Aerospace Workers*, 479 F.2d 1211, 1213 (D.C. Cir. 1973); *Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968); *Miniard v. Lewis*,

387 F.2d 864, 865 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968); *Tomlin v. Board of Trustees of the Construction Laborers Pension Trust for Southern California*, 586 F.2d 148, 151 (9th Cir. 1978); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1265 (9th Cir. 1979); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981); *Morgan v. Mullins*, 643 F.2d 1320, 1323 (8th Cir. 1981); *Mestas v. Huge*, 585 F.2d 450, 453-54 (10th Cir. 1978). These cases make clear that it is for the Trustees, not the courts, to choose between two reasonable alternatives.

While the Trust Agreement may be susceptible to the interpretation which Brug urges (i.e., that it covers a local union's clerical employees), it is at least equally susceptible to the Trustees' interpretation (i.e., that it does not cover such employees). Since the Trustees' interpretation is a reasonable one, its application in this case was not arbitrary or capricious, and should be upheld by this Court.

C. The Decision of the Court of Appeals Is in Conflict with This Court's Decision in United Mine Workers of America Health and Retirement Funds v. Robinson, 102 S.Ct. 1226 (1982)

United Mine Workers of America Health and Retirement Funds v. Robinson, 102 S.Ct. 1226 (1982), concerned the scope of federal court review of a collective bargaining agreement which discriminated between two classes of widows of coal miners who died prior to the effective date of the agreement—those whose husbands were receiving pensions when they died and those whose husbands were still working at the time of death even though they were eligible for pensions. The collective bargaining agreement increased the health benefits, payable out of a trust fund financed by contributions from the coal operators, for widows in the former class but made no increase for those

in the latter class. Widows in the latter class brought a class action in federal district court against the trustees of the fund, alleging that the requirement that a miner actually be receiving a pension at the time of his death in order to make his widow eligible for the increased health benefits had no rational relationship to the purposes of the trust fund and therefore was illegal under Section 302 of the LMRA. This Court held that Section 302(c)(5) of the LMRA does not authorize federal courts to review for reasonableness the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. This Court reasoned as follows:

> . . . There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.' *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n 20 . . . Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement." (Footnote omitted.) *Robinson*, 102 S.Ct. at 1233-34.

Robinson makes clear that a negotiated agreement, such as the Trust Agreement in the instant case, can permissibly discriminate in favor of bargaining unit employees, and that, under Section 302(c)(5) of the LMRA, a court cannot second guess the trustees with regard to their enforcement of such a trust agreement. Here the Ninth Circuit acted contrary to the teachings of *Robinson*[1] by second guessing the Trustees' attempt to correct an erroneous interpretation of the Trust Agreement.

The principal purpose of the CPTF, as a collectively-bargained pension trust fund established under the authority of Section 302(c)(5) of the LMRA, is to serve the bargaining unit employees, who are its principal beneficiaries and for whose benefit it was originally created. By rescinding Amendment 13 to the Pension Plan, the Trustees sought to correct an erroneous interpretation of the Trust Agreement, which if left uncorrected would result in the deviation of trust assets from the CPTF's purpose. By correcting this mistake, the Trustees sought to protect the principal beneficiaries of the CPTF—carpenters and piledrivers in the trade. *Robinson* indicates that setting up priorities among potential beneficiaries is not per se discriminatory, and that the trustees have a great deal of discretion in balancing the interests in that regard. Here the Trustees properly used their discretion to correct an erroneous interpretation of the Trust Agreement and thereby preserve the assets of the CPTF against claims by Brug and other persons under similar circumstances. Through this action, the Trustees reaffirmed the priorities which had originally been established by the collective bargaining parties. To require the CPTF to pay for that mistake by awarding pension benefits to Brug is totally inconsistent

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[1]Petitioner recognizes that the decision of the Court of Appeals in the instant case antedates this Court's decision in *Robinson*.

with the purposes of the CPTF and contrary to this Court's decision in *Robinson*.

D. The Decision of the Court of Appeals Is in Conflict with the District of Columbia Circuit's En Banc Decision in Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950, 517 F.2d 1275 (D.C. Cir. 1975), Concerning the Inequity of Awarding a Pension to a Person Without Substantial Contributory Employment

At the time of its decision, *Pete v. United Mine Workers of America Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975), was the latest in a series of cases challenging the validity of the "signatory last employment" provision limiting eligibility for the flat retirement pension provided by the United Mine Workers of America Welfare and Retirement Fund of 1950. Plaintiff classes consisted of miners whose applications for retirement benefits were denied. The Pete class consisted of coal miners who had retired prior to February 1, 1965, and whose applications had been denied because they had not ceased work in the coal industry immediately following some period of employment by a mine operator signatory to the National Bituminous Coal Wage Agreement. The Kiser class consisted of coal miners who had retired between February 1, 1965, and August 14, 1970, and whose applications had been denied because they had not ceased work in the coal industry immediately following one year of employment by a signatory operator. Prior to the *en banc* decision in *Pete*, the trustees of the fund adopted a five year contributory service provision to replace the "signatory last employment" requirement, and all members of the Pete and Kiser classes who had more than five years of contributory employment were enrolled as pensioners. As a result, the *Pete* court focused on the claims of the members who had less

than five years of contributory employment and addressed the issue of "the period of signatory service needed to qualify for a pension." *Id.* at 1279.

In an earlier appeal, a panel of the District of Columbia Circuit, in holding the "signatory last employment" requirement to be invalid, had emphasized that "the Trustees have failed to explain why it is reasonable to award a pension to a man who has worked only one year in contributory employment and to deny one to a man who has worked 19 out of his 20 years in the coal industry in contributory employment." *Roark v. Boyle,* 439 F.2d 497, 503 (D.C. Cir. 1970) (*Roark II*). The *Roark II* panel pointed out that Section 302(c)(5) of the LMRA[8] "requires that each pensioner have some history of contributory employment." *Id.* at 501. The *Roark II* panel ruled that "the spirit of the Taft-Hartley proviso [Section 302(c)(5) of the LMRA]" would be served "by gearing eligibility for a full pension to a condition of substantial contributory employment." *Id.* at 503; *Pete,* 517 F.2d at 1284. However the *Roark II* panel failed to define specifically what minimum amount of signatory employment Section 302(c)(5) required.

In its *en banc* decision in *Pete,* the District of Columbia Circuit determined that a five year signatory service requirement implements the analysis of *Roark II* and furthers the purposes of the fund,[9] and that the trustees' refusal to grant pensions to miners with less than five years

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[8]The provision of Section 302 of the LMRA authorizing employers to contribute to trust funds requires that such funds be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents." Section 302(c)(5), 29 U.S.C. § 186(c)(5).

[9]The court emphasized that the element of "substantial" contributory service was identified in *Roark II* as the "contemplation and spirit" of Section 302(c)(5) of the LMRA. *Pete,* 517 F.2d at 1287.

of signatory service cannot be deemed arbitrary or capricious. The court's reasoning, which has direct bearing on the instant case, was as follows:

> ". . . As of the date of *Roark II*, this court was aware that the overwhelming bulk of eligibles, under the last year's signatory service provision, had total signatory service that was substantial (five years or more). What the court was concerned with was the possible discriminatory unfairness, in the Fund's maturing years, of denying applications of other persons with substantial signatory service, when there was even a minimum possibility of eligibility, through last year's signatory service, on total signatory service that was not substantial. It suggested that the issue of discriminatory unfairness be removed by conditioning eligibility on substantial signatory service.
>
> *Roark II* can give no comfort to any miner without substantial signatory service. The only equity that was recognized was that of persons having substantial signatory service. The court stressed the need for substantial signatory service—either by recognizing that last year's signatory service, though generally the functional equivalent of substantial signatory service, be conjoined with an explicit requirement of substantial signatory service or by permitting a sole criterion of substantial (at least five years) signatory service. *Roark II* ruled that the 'last year' provision could not validly be the exclusive means of defining substantial signatory service, but it certainly did not countenance that the concept of substantial signatory service be scrapped altogether. And the only awards made by *Roark II* and its progeny provided pension benefits to plaintiffs with between eight and sixteen years of signatory service.

> We need not tarry with the possibility that *Roark II* left a residual question arising out of a few payments having been made, on the basis of last year's signatory service, to persons without substantial signatory service. If it is premised that such payments were improper, the remedy if any would lie against the Trustees subject to whatever defenses are available to a fiduciary. Equity does not take account of mistakes by requiring their escalation. The same result is reached if it is premised, on the other hand, that any past payments on the basis of the last signatory criterion are sustainable, even in the absence of substantial signatory service, on the theory that the miner met all then-existing criteria, prior to our *Roark* decisions, and is entitled to payment under *Danti v. Lewis* [, 312 F.2d 345, 349 (D.C. Cir. 1962) (holding that a miner who met all existing criteria could not be denied a pension on the basis of requirements adopted by the Trustees after the date of his application).] Plaintiffs could not proceed on that analysis. In considering plaintiffs' plea for a reconstitution of eligibility requirements by a court of equity, the latitude of an equity court is subject to the purpose of its authority, to safeguard against arbitrary or capricious actions of the Trustees which threaten to frustrate rather than fulfill the purposes of the Fund, and we would not have latitude as an equity court to dispense with the criterion of substantial signatory service (at least five years) that has been both projected in *Roark II* and accepted by the Trustees." *Pete*, 517 F.2d at 1285-86.

The *Pete* court recognized that there may be miners with less than substantial contributory service "who are now in need, but for a court to ignore the Trustees' proposal and bestow a lifetime pension for any year's contributory

service would confuse pensions with welfare, and interject . . . an unprecedented 'judicial imposition of private philanthropy.'" *Id.* at 1287.

Pete makes clear that the refusal by trustees to grant lifetime pensions to those employees who have only a few months of covered employment is not arbitrary or capricious. In the instant case, the Ninth Circuit has ignored this lesson of *Pete*. The Ninth Circuit asserts that the Trustees had the discretionary authority under the terms of the Trust Agreement both to include the clerical employees and to terminate the clerical employees' inclusion in the Pension Plan. *Brug*, 669 F.2d at 575. But the Ninth Circuit virtually fails to address two important issues: (1) whether the Trustees had the discretionary authority to grant pensions to clerical employees with only a few months of covered employment, and (2) whether it was arbitrary and capricious for the Trustees to deny pensions to clerical employees with only a few months of covered employment, especially when their inclusion in the Pension Plan was based on an erroneous interpretation of the Trust Agreement. With regard to these important issues, the Ninth Circuit merely states that the "Pension Plan provided for pension credit for service before the designated contribution date for other employees as well." *Id.* Even assuming *arguendo* that such credit is provided, the crucial concern addressed in *Pete* was the extent of the covered employment. In that regard, *Roark II* and *Pete* both emphasized that Section 302(c)(5) requires that each pensioner have substantial contributory employment. Plaintiff Brug simply does not meet that requirement. As a result, the Trustees' refusal to grant her a lifetime pension was not arbitrary or capricious.

The Trustees' refusal to grant Brug's application for a pension is responsive to the court's concern in *Roark II*

over the discriminatory unfairness of denying applications of other persons with substantial contributory employment, when even a small number of people are eligible for pensions based on a minimal amount of contributory employment. In the instant case, numerous carpenters have been denied pension coverage despite employment by signatory employers who had made substantial contributions on their behalf for a number of years. That office clerical employees, who had other pension resources under collective bargaining agreements between their union employers and their union representative (the OPEU), were receiving substantial lifetime pension benefits supported by only meager contributions to the CPTF over a period of a few months is a clear example of the discriminatory unfairness condemned in *Roark II*.[10]

Thus, the Trustees' denial of Brug's pension application is consistent with the teachings of *Roark II* and *Pete*, and should be upheld by this Court.

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[10]The analysis in *Roark II* and *Pete* is consistent with the fiduciary standard set forth in ERISA. Section 404(a)(1) of ERISA provides, in part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . ." 29 U.S.C. § 1104(a)(1).

CONCLUSION

The decision of the Court of Appeals seems like an appealing one because the CPTF has a deep pocket. In fact, however, that decision, if permitted to stand, perpetuates a gross discriminatory act in total violation of ERISA and Section 302 of the LMRA. Under that decision, Plaintiff Brug will get two full pensions, one as a beneficiary under an office employees contract with her employer and the other under the CPTF. The latter is supported by contributions taken from the wage package of carpenters and solely paid for by them. Brug never paid for the pension from the CPTF out of her own wage package. And no carpenter has ever been permitted to purchase a lifetime pension for approximately $600 (the equivalent of less than three months of pension payments to Brug by the CPTF). In other words, the action of the Court of Appeals permits Brug to receive a lifetime pension of $255 a month for the mere payment of roughly $600 total by her employer under Amendment 13. Everyone in the world would like a pension of $255 a month financed by a pension contribution of approximately $600. That is so totally actuarially unsound and wrong that it does not require further comment. And that is why the Trustees were told that their action was illegal and that they did not have the authority to amend the Trust Agreement which could only be amended by the collective bargaining parties.

This act is patently discriminatory against all carpenters who are required to contribute thousands of dollars during their working lives to qualify for a pension while Brug is permitted to get hers for only a $600 contribution. This is so discriminatory that it absolutely screams for this Court, its busy schedule notwithstanding, to reverse the Ninth Circuit's decision.

Finally, it should be noted that Brug was not lulled into some false sense of security by the conduct of the CPTF. Brug applied for a disability pension. Either she had a disability or she did not. Thus, her retirement was motivated by physical disability and not by any conduct of the CPTF.

The only argument that Brug could offer would be based on the doctrine of estoppel. However, the Ninth Circuit has ruled that Section 302 of the LMRA prohibits the payment of a pension on an estoppel theory to someone determined to be ineligible under the provisions of the trust agreement. *Thurber v. Western Conference of Teamsters Pension Plan,* 542 F.2d 1106, 1109 (9th Cir. 1976); *Aitken v. IP & GCU-Employer Retirement Fund,* 604 F.2d 1261, 1266-67 (9th Cir. 1979).

If the decision below is permitted to stand, trustees will be able to make all kinds of sweet little deals for special people and special employers while the ordinary people and the ordinary workers will continue to have to slug it out to earn their pensions.

For the reasons suggested above, the Petition for a Writ of Certiorari should be granted.

Dated: July 15, 1982

Respectfully submitted,

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APPENDIX A

F I L E D
FEB 12, 1982

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BRUG, Plaintiff-Appellant, v. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant-Appellee.	NO. 80-4321 D.C. No. C-76-2682 WAI OPINION

Appeal from the United States District Court for the Northern District of California
The Honorable Richard M. Bilby, Presiding Argued and Submitted December 15, 1981

Before: CHOY and HUG, Circuit Judges, and GRAY*, District Judge.

HUG, Circuit Judge:

This is an action by a clerical employee of a union claiming pension benefits for disability retirement. She became a beneficiary of the Pension Plan under an amendment, adopted by the Trustees of the plan, effective June 1, 1975. The amendment and implementing regulations included certain clerical workers as beneficiaries. In March 1976 the Trustees rescinded the amendment and the regulations. Prior to the rescission of the amendment and regulations she became disabled and made application

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* The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

for disability retirement, for which she was eligible at the time. The Trustees delayed action on her application until after the rescission of the amendment and then denied her benefits on the basis that she was not an employee covered by the plan. The district court upheld the action of the Trustees and entered judgment against the plaintiff. The issue is whether the rescission of the amendment could be applied retroactively so as to exclude the plaintiff as a covered employee. We hold that it could not, and that the action of the Trustees was arbitrary and capricious in not applying the terms of the Pension Plan in effect at the time that she applied for the pension benefits for

which she was eligible. We therefore reverse the judgment of the district court.

I

FACTS

The Carpenters Pension Trust Fund for Northern California is a jointly administered employee benefit trust created by a Trust Agreement executed in 1957 by various contractors' associations and the district councils and locals of the Carpenters Union. The Trust Agreement initially provided for pension benefits for the employees of the contractors who were required to make contributions pursuant to collective bargaining agreements with the Carpenters Union. Effective in 1965 the local unions, the district councils, and other labor organizations

affiliated with the Carpenters Union were also permitted to make contributions to the pension fund for their employees.

The Trust Agreement and the Pension Plan adopted pursuant to the Trust Agreement both contained an identical provision defining an employee covered by the Pension Plan. The provision states:

> The term "Employee" means any employee of an Individual Employer who performs one or more hours of work covered by any of the Collective Bargaining Agreements. The term "Employee" shall also include employees of Local Unions and District Councils on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of said employees is not a violation of any existing law or regulation.

Nothing in the Trust Agreement or the Pension Plan limits the categories or classifications of union employees for whom pension contributions may be made.

Article II of the Pension Plan provides:

> All Employees of Local Unions and District Councils on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees are also eligible to participate in the benefits provided under the Pension Plan.

Pursuant to the foregoing provisions of the Trust Agreement and Pension Plan, officers and business agents of the Carpenters Union have had pension contributions made to the Pension Plan on their behalf since 1965. Prior to June 1, 1975, however, local unions and district councils

were not required to contribute to the Pension Trust Fund on behalf of their office clerical employees.

In 1974, following an audit, the Internal Revenue Service advised the Trustees that contributions to the Pension Plan by certain local unions and district councils failed to comply with the coverage requirements of the Internal Revenue Code and discriminated in favor of highly compensated officers and business agents and against office clericals employed by the Union.

As a result of this warning from the IRS, the Trustees considered amending the Pension Plan to require the inclusion of clerical employees of any local union or district council

that made contributions for its officers and non-clerical employees. The Trustees were advised by their attorneys that clerical employees should be included because the IRS report suggested that the disparity between retirement benefits received by the union clericals and the benefits received by the union officers and business agents could affect the tax-exempt status of the pension fund. The Trustees were informed by their financial consultants and actuaries that the financial impact of including the clerical employees of the unions in the Pension Plan was minimal and that such inclusion would not result in placing a burden on the retirement

benefits payable to members of the Carpenters Union.[1/]

After several months of discussion, the Trustees adopted Amendment 13 and implementing regulations on August 26, 1975, the effect of which was to require the union employers who desired to continue participating in the plan to make contributions for all full-time employees, including the clerical employees as well as the union officials and business agents. The "contribution date" for the clerical employees was established as June 1, 1975. Earlier contribution dates had been previously established for other employees covered by the Pension Plan. The significance of the "contribution date" under the plan is that employers were required to contribute for hours

worked by their employees after that date. The covered employee received what was defined as "future service" credit for periods of employment after the contribution date and also received "past service" credit for periods of employment with the participating employers before the contribution date.[2/] The clerical workers were thus entitled to "past service" credit for periods of employment with the Union prior to June 1, 1975.[3/]

A newsletter was sent by the Trustees to all of the local unions, district councils and the State Council of Carpenters, advising them that if they wished to contribute to the Pension Plan for any of their employees, they would be required to contribute

for all full-time employees.

Between September 1975 and January 1976, five clerical employees applied for, and were granted, pensions pursuant to Amendment 13. In November, 1975, Brug, a clerical employee of Local No. 22, who was suffering from health problems, contacted the Pension Services Department of the Union and inquired about her eligibility for an early retirement pension. Local No. 22 had made contributions for all its employees, including clerical employees, as required by Amendment 13. Michael Pierce, the Supervisor of the Pension Services Department, informed Brug that at age 63 she was not eligible for normal retirement and that her 12 years and 7 months of past service was not sufficient to establish

eligibility for an early retirement pension. However, she was told that because of her health problems she could qualify for a disability retirement pension if she were to qualify for Social Security disability benefits.[4/]

Brug made the application with the Social Security Administration and in February, 1975 was informed that she had been awarded the Social Security disability benefits. She then applied for a disability retirement pension. Brug's application was reviewed by the Pension Services Department, which determined that she satisfied all of the eligibility criteria. The Pension Services Department then forwarded Brug's

application to the Trustees' Pension Approval Committee (the "Committee") with a recommendation that the application be approved. Ordinarily, the Committee follows the recommendation of the Pension Services Department in voting to approve or reject pension applications. The minutes of the Committee meeting are subsequently presented to the full Board of Trustees for their adoption. Accordingly, Pierce informed Brug that the approval of her application was automatic.

Brug's application came before the Committee on March 16, 1976. Instead of automatically approving the application however, the Committee, aware of some recent complaints from carpenters about the granting of

pension benefits to the clerical employees of the unions, deferred consideration of Brug's request until the full Board of Trustees had had a chance to reconsider the propriety of Amendment 13. The Board of Trustees called a special meeting on March 23, 1976 and voted to rescind the amendment, to accept no further contributions to the pension fund on behalf of the unions' clerical employees, and to refund all contributions that had already been made on their behalf. The Committee then reconvened and voted to deny Brug's application.

II

STANDARD OF REVIEW

The Trustees' actions in administering the pension fund are subject

to the fiduciary standard set forth in ERISA. Section 404 (a)(1) of ERISA provides, in part, that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> > (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . .

29 U.S.C. § 1104(a)(1).

This court has held that under ERISA and under the Labor-Management Relations Act the trustees' decision may be reversed only when it is arbitrary or capricious. Gordon v. ILWV-PMA Benefit Funds, 616 F.2d 433, 438 (9th Cir. 1980); Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976);

Danti v. Lewis, 312 F.2d 345, 348 (D.C. Cir. 1962). In Rehmar we stated:

> Where ... the instrument defining the fiduciaries' duties gives them broad discretion, as is generally the case with welfare and pension trusts, the courts limit their review and intervene in the fiduciaries' decisions only where "they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run."

555 F.2d at 1371, quoting Kosty v. Lewis, 319 F.2d 744, 747 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964). The critical inquiry, then, is whether the denial of Brug's pension application due to the rescission of Amendment 13 and the implementing regulations was an arbitrary or capricious action.

III

DISCUSSION

The district court, in concluding that the Trustees did not act arbitrarily or capriciously, stated:

> If the defendant Fund had the power to rescind Amendment Thirteen, then plaintiff's claim must fail as any pension she might receive had to be approved by the Board of Trustees. While Mr. Pierce's office has approved the plaintiff's application, it did so acting under the provisions of Amendment Thirteen. Once that Amendment was rescinded there was no basis for his office to approve such an application. Furthermore, that approval did not vest any right in the plaintiff. Only the Board of Trustees have that power and it was never exercised in plaintiff's behalf.

There is no question that Brug met the eligibility requirements for the disability pension at the time she retired and applied for the pension.[5/]

There is also no doubt that under Amendment 13 and the implementing regulations she was an employee who was covered by the Pension Plan. It is clear that Brug's disability had been established, that she retired, and that she filed her pension application all before the date that Amendment 13 and the implementing regulations were rescinded. The question, therefore, is whether the Trustees, during the pendency of Brug's application, could retroactively amend the plan so as to disqualify her as a beneficiary.

This process of pulling the rug out from under Brug violates the terms of the Pension Plan itself. Article X, Section 1 of the Pension Plan's Rules and Regulations provides:

> Amendment. The Board of Trustees may amend or modify this Pension Plan at any time or from time to time in accordance with the Trust Agreement, except that no amendment or modification may reduce any benefits payable to Employees who retired prior to such amendment or modification so long as funds are available for payment of such benefits. . . . (emphasis added.)

The appellee does not contend that Amendment 13 violated ERISA or any other statutory requirement or federal regulation. Appellee asserts that the Amendment to the plan was unlawful because it was in violation of the basic Trust Agreement, for the reason that it had never been intended by the Trustors that the clerical employees of the unions would be covered. This argument is not persuasive in light of the Trust

Agreement provision in Article I, Section 4, which defines the employees who are covered, stating:

> The term "Employee" shall also include employees of Local Unions and District Councils, and employees of labor councils of other labor organizations with which a Local Union or District Council is affililated, on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of any said employees is not a violation of any existing law or regulation.

The provision is clear and unambiguous. There is no contention that the inclusion of the clerical employees violated any existing law or regulation, and thus the action of the Trustees in providing for the inclusion of clerical employees, for whom contributions were to be made by

employing union organization, was well within their discretion.

Following the adoption of Amendment 13 and the implementing regulations, there had been complaints and threats of suit by carpenters who contended that the action was unfair because it allowed pensions for the clerical workers to be computed on the basis of service rendered prior to the date the contributions for service were made by the employing union organization. However, this was a discretionary matter for the Trustees. The Pension Plan provided for pension credit for service before the designated contribution date for other employees as well. It is the nature of a pension plan such as this one to provide

benefits for periods of service for which no contributions are specifically made or required. This plan provided such benefits, including death benefits, disability pensions, credit for past service, credit for service in the armed forces, and partial pensions based on credited service with other related plans. This type of benefit has to be based upon actuarial probabilities, not specific contributions for specific employees.

The Trustees had the discretionary authority under the terms of the Trust Agreement to include the clerical employees. They also had the authority to terminate the clerical employees' inclusion in the plan.[6/] However, the Trustees did not have the

discretionary authority to apply that termination so as to preclude Brug's eligibility for pension benefits that had vested in the meantime.

In Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962), and Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974), the District of Columbia Circuit considered a question similar to the one presented here. In Danti v. Lewis, the employee met all eligibility requirements for a pension at the time he filed his application. The trustees, however, denied the application because it failed to comply with an amendment that had been adopted after the application was filed. The court found that the trustees' action was arbitrary and capricious, concluding

that the application should have been reviewed under the eligibility standards in effect at the time it was submitted by the employee.

In Kiser v. Huge, former mine workers brought a class action against the trustees of the United Mine Workers Retirement Fund, alleging that the denial of their pension benefits on the basis of a resolution passed after they submitted applications was arbitrary and capricious. The court agreed, stating that "the pension benefits of members of the plaintiff class began accruing on the dates when their applications should have been approved by the Trustees. . . ." 517 F.2d at 1247 (emphasis in original). Relying on Danti, the

court concluded that "pension rights vest at the date a retired miner applies for benefits, if the applicant meets all eligibility criteria then in effect." Id.

The appellee argues that Danti and Kiser are distinguishable because they involved retroactive application of eligibility rules, whereas this case was a retroactive exclusion of beneficiaries from the plan. In our view, this is a distinction without a difference. The rule stated in Danti and Kiser is equally applicable whether the trustees use newly-adopted eligibility criteria as the basis for denying benefits or accomplish the same goal by simply eliminating a class or employees from the list of

plan beneficiaries.

This court, in a different but analogous situation held in Burroughs v. Board of Trustees of Pension Trust, etc., 542 F.2d 1128 (9th Cir. 1976), cert. denied, 429 U.S. 1096 (1977), that the trustees had acted arbitrarily and capriciously in retroactively applying a break-in-employment rule to the plaintiff who had no notice of its existence and, thus, no reasonable opportunity to protect himself from its impact during the years to which it was retroactively applied. The court stated that in determining whether trustees act arbitrarily and capriciously the question is "not ... what the eligibility requirements for the pension are, but rather ...

how the changes in qualifications are made." 542 F.2d at 1131. Thus, the arbitrary and capricious action in Burroughs was not the adoption of the break-in-employment rule. It was, rather, the application of that rule to an employee who, in applying for a pension, relied upon his eligibility under plan provisions that he thought were still in effect.

Under the Pension Plan in existence at the time of her disability retirement, Brug met all of the eligibility requirements. The fact that the Trustees did not formally pass upon the matter until after Amendment 13 was rescinded can have no effect upon her entitlement.

The judgment of the distrct court is REMANDED for entry of judgment consistent with this opinion.

FOOTNOTES

1/ Page 9 There were between 70 to 80 clerical employees employed by the union that would potentially be entitled to benefits under the amendment. There were between 40,000 to 50,000 carpenters working under collective bargaining agreements who were covered by the plan and approximately 5000 employers who contributed to it.

2/ Page 10 "Past service" credit was also given under the terms of the plan for certain military service and time spent as a prisoner of war. "Future service" credit was also given for certain periods when the employee was not actually working for a participating employer due to service in armed forces and periods of disability during which workman's compensation benefits were paid.

3/ Page 10 The major significance of the distinction between "past service" credit and "future service" credit is that in order to qualify for normal or early retirement the employee was required to have 15 years of combined service credit, either "past" or "future" or have only

10 years of "future service" credit. However, for disability retirement, such as Brug applied for, no such distinction was made, and only 10 years of service whether "past" or "future" was required.

4/ Page 12 Article III, Section 9 of the Pension Plan provided that "the Board shall accept as sole proof of total disability a determination by the Social Security Administration that the Employee is entitled to a Social Security Disability Benefit in connection with his Old-Age, Survivors and Disability Insurance coverage.

5/ Page 17 Article III, Section 7 of the Pension Plan provided:

> Disability Pension. An Employee shall be entitled to retire on a Disability Pension if he is totally disabled at a time when:
>
> a. He has not yet attained age 65;
> b. He has at least 10 years of Pension Credit (Past and Future Service Credit) without a break in employment as defined in Article IV, Section 6; and
> c. he has actually worked in Covered Employment for at least 350 hours in the

12-month period following his Contribution Date, or for 700 hours after his Contribution Date.

Brug was 63 years of age, had over 10 years of pension credit and had worked in covered employment at least 350 hours in the 12-month period following the contribution date. She had established her total disability by obtaining Social Security disability benefits.

6/ Page 22 Any question whether the exclusion of the clerical employees of the union might jeopardize the qualification of the plan under ERISA, as suggested in the IRS audit, is not before us.

APPENDIX B

F I L E D

JUN 9 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARY BRUG, an individual, Plaintiff, vs. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant.	No. C-76-2682 WAI ORDER

This case involves a suit under 29 U.S.C. §1132(a)(1)(B) (ERISA) by a former clerical employee of Carpenters Local #22, against the pension plan of the Carpenters Pension Trust Fund for Northern California and various other defendants. All the defendants, except

the Pension Fund, were dismissed out of the suit prior to trial. This Court has jurisdiction under 29 U.S.C. §§1132(a)(1)(B) and 1132(e)(1).

The background of the suit commences in the winter and spring of 1975; at that time all of the constitutional (elected) officials of the Carpenters Locals were covered by the defendant Pension Plan and contributions to that plan had been made for those officials by their locals since commencement of the plan.

In Southern California, the Carpenters Pension Plan also covered clerical employees as well as elected officials and contributions were made by various locals for the covered clerical help. This disparity of

coverage resulted in some pressure for the Northern California Locals to include their clerical employees who were also covered by their own union pension fund (office and professional employees). On May 20, 1975, the Internal Revenue Service informed various of the Carpenters Locals that the pensions of the constitutional officials might be in jeopardy as the clerical employees were not covered; thus the plan discriminated in favor of the highly paid executive employees.

As a result the defendant Plan adopted Amendment Thirteen (Plaintiff's Exhibit #3), with an effective date of June 1, 1975. This Amendment extended coverage of the defendant Plan to clerical employees such as plaintiff and provided for past service

credits to be given to employees of labor organizations such as plaintiff. Pursuant to Amendment Thirteen, the defendant Fund adopted on August 26, 1975, certain rules and regulations which were mailed to all local unions, district councils and state councils of carpenters on September 19, 1975. (Plaintiff's Exhibit #4). These regulations provided for all union employees to be covered as of June 1, 1975, and contributions by the various labor organizations to the Fund be made as of that date. If any local, district or state group did not make the contributions by December 31, 1975, for all its employees, then future coverage was to be denied for all its employees and officers.

Pursuant to these new regulations, Local 22 made all the necessary contributions to cover all its employees and officers, including plaintiff. During the period of time September 19, 1975, through January 1976, five clerical employees, newly covered under the defendant Plan, applied for and were granted pensions pursuant to the terms of Amendment Thirteen.[1/]

Plaintiff who suffered a nervous breakdown during early fall of 1975, due to increased work load resulting

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1/ In most cases, this meant they obtained life-long pensions varying from $340 to $600 per month for total contributions by their union employers to the defendant Fund of approximately $800-$1,200 (Plaintiff's Exhibits #18-22)

from the retirement of two fellow clerical employees, first sought an early retirement pension on November 13, 1975 (Plaintiff's Exhibit #6). She was subsequently told by Michael Pierce, Supervisor of Pension Services Department of the defendant Fund, that her 12 years 7 months past service did not qualify her for an early retirement pension. However, he did state that if she obtained a Social Security disability pension, she would qualify for a disability retirement pension. Plaintiff subsequently obtained such a pension from the Social Security Administration and an application for a disability retirement pension was processed by Mr. Pierce's department. When plaintiff called Mr. Pierce on February 11, 1976, he advised her that

everything was in order but her pension had to be approved by the pension approval committee, which was automatic.[2/]

On March 16, 1976, plaintiff's application was approved by Mr. Pierce's department (Plaintiff's Exhibit #10) and placed upon the agenda for the March 16, 1976, meeting of the defendant's pension approval committee. (Plaintiff's Exhibit #8).[3/]

2/ Although a supervisor of his department, Mr. Pierce was not a managing agent as he did not have hiring or firing authority over the employees in the department, nor did he have authority to approve pensions. That authority, he stated, was held solely by the Board of Trustees of the Fund.

3/ Plaintiff's name was included in the list of approved pensions. Mr. Pierce said to his recollection, hers was the first name ever included on that list to be rejected by the Committee.

During late winter and early spring of 1975, the Trustees of the defendant Fund began to receive complaints from various carpenters who had been denied pensions about the granting of pensions to the clerical help. The essence of the complaints were:

1. Clerical employees had pensions under their own collective bargaining agreement (OPE) to which the various carpenters locals had contributed;
2. They were getting life-time pensions for a very small contribution to the fund; 4/

4/ The defendaht had been advised by the actuaries prior to its adoption of Amendment Thirteen that the inclusion

3. The clerical employees were being treated better than many carpenters for whom substantial contributions had been made to the fund but not have the required years of service. (sic)

As a result of these complaints, the pension approval committee, on March 16, 1977, voted to defer action on plaintiff's application and recessed the meeting until the full Board of Trustees could reconsider Amendment Thirteen at the March 26 meeting. Plaintiff testified that Mr. Pierce called her after the meeting and advised her that her application had been approved in essence but

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4/ (continued)

of 70 to 80 clerical employees under that Amendment would not jeopardize the fund.

was being held up until the Board of Trustees determined if the fund was going to continue covering clericals.

At the March 26 meeting the Board of Trustees met and passed a resolution rescinding Amendment Thirteen.[5/] Immediately thereafter the pension approval committee reconvened its meeting and voted to deny plaintiff's application for a pension. (Plaintiff's Exhibit #11)[6/]

5/ Amendment Thirteen prior to its rescission had never been submitted to the Internal Revenue Service or the Department of Labor for approval. The rules and regulations promulgated pursuant to Amendment Thirteen were officially rescinded at the May 1976 meeting of the Board of Trustees.

6/ Plaintiff appealed this order but it was denied by the Board of Trustees at its August 1976 meeting.

All contributions made by Local 22 on plaintiff's behalf were refunded by the defendant Fund after rescission of Amendment Thirteen.[7/]

Plaintiff introduced evidence of other union employees who were receiving pensions from or were covered by the defendant Fund. In each instance, however, the carpenters union organization in question had been contributing prior to June 1, 1975, to the pension fund for each employee.

Both parties have stressed the equity of their positions and both have much to talk about; however, this is

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7/ So also were contributions to other locals for their clerical employees; however, the contributions for the five clerical employees whose pensions had been approved were not refunded.

not a case of equities but law.[8/] If the defendant Fund had the power to rescind Amendment Thirteen, then plaintiff's claim must fail as any pension she might receive had to be approved by the Board of Trustees. (Plaintiff's Exhibit #2, page 35, Article IX, Section 2(c)) While Mr. Pierce's office had approved the plaintiff's application, it did so acting under the provisions of Amendment Thirteen. Once that Amendment was rescinded there was no basis for his office to approve such an application. Furthermore, that approval did not vest any right in the plaintiff. Only the Board of Trustees have that power and it was never exercised in

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8/ Prior to trial plaintiff abandoned her claim of estoppel.

plaintiff's behalf.

The defendant Fund for reasons which it deems sufficient determined that the Fund should rescind its action in adopting Amendment Thirteen. The Board of Trustees decision may be reversed only where they are arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or erroneous on a question of law. Rehman v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976); Hicks v. Pacific Maritime Assn. 567 F.2d 355 (9th Cir. 1978). The Court finds none of these elements in this decision by the Fund.[9/]

9/ The Court has not deemed it necessary to make a determination as to whether the initial adoption of Amendment Thirteen was legal; if not, then plaintiff would have no rights at all and if it were

IT IS ORDERED that all of plaintiff's claims for relief be DENIED; that each party bear its own costs and that JUDGMENT be entered by the Clerk in accordance herewith.

This Opinion shall constitute the Findings of Fact and Conclusions of Law pursuant to Rule 54.

The Clerk of the Court is directed to mail copies of this Order to all counsel of record.

SO ORDERED this 4th day of June, 1980.

Richard M. Bilby
United States District
Judge

9/ (Continued)

properly adopted, the Court has now found that it was properly rescinded.

APPENDIX C

FILED
APR 16 1982

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BRUG, Plaintiff-Appellant, v. THE PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, Defendant-Appellee.	No. 80-4321 D.C. No. C-76-2682 WAI ORDER

Appeal from the United States District Court for the Northern District of California

Before: CHOY and HUG, Circuit Judges, and GRAY*, District Judge.

The panel as constituted in the above case has voted to deny the

*The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

petition for rehearing. Judges Choy and Hug have voted to reject the suggestion for a rehearing en banc, and Judge Gray makes no comment with respect to the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

STATUTORY PROVISIONS

29 U.S.C. § 186

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor oganization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor oganization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in Part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable ...

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of

such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; ...

29 U.S.C. § 1104

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

No. 92-[illegible]

In the Supreme Court of the United States

October Term, 1992

Northern Pine of the Confederated Pinetree Tribes Fund for Northern California,
Petitioner,

vs.

Mary Snow,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 12, 1992

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No. 82-104

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PENSION PLAN OF THE CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioner,

VS.

MARY BRUG,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mary Brug respectfully prays that the Court deny the Petition for a Writ of Certiorari filed by the Pension Plan of the Carpenters Pension Trust Fund for Northern California to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 12, 1982.

I

OPINION BELOW

The opinion of the Court of Appeals, a copy of which is attached as Appendix "A" to the Petition for Writ of Certiorari, is reported at 669 F.2d 570.

II

STATUTORY PROVISION

The relevant statutory provision is Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104.

III

STATEMENT OF THE CASE

Mary Brug (hereinafter "Brug") filed this action on December 1, 1976, predicating federal jurisdiction upon Sections 502(a)(1)(B) and 502(e)(1) of ERISA (29 U.S.C. § 1132(a)(1)(B) and 1132(e)(1)), naming the Pension Plan of the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Plan"), the Trustees of the Pension Plan and Carpenters Local Union No. 22 as Defendants. In her complaint Brug alleged that by deferring consideration of and subsequently denying her application for a pension after she had retired and qualified for pension benefits under the existing provisions of the Pension Plan, the Trustees and Pension Plan violated the governing instruments of the Plan and the fiduciary obligations set forth in ERISA, and acted arbitrarily, discriminatorily and capriciously.

On October 14, 1977 Brug filed a motion for summary judgment, and Defendants thereafter filed cross-motions for summary judgment. Following oral argument on the motions, the District Court dismissed Carpenters Local 22 as a party defendant and took under submission the motion and cross-motions as they related to the individual Trustee Defendants and to the Defendant Pension Plan. On January 19, 1978, the Court filed a Memorandum of

Decision denying Brug's motion and granting the Trustee Defendants' cross-motions.

Following further discovery, Brug renewed her motion for summary judgment. On March 22, 1979 the District Court denied the renewed motion for summary judgment.

Pursuant to leave of Court, Brug on August 27, 1979 filed a First Amended Complaint for declaratory judgment, damages and injunction. In her First Amended Complaint, which named the Pension Plan as sole Defendant, Brug alleged that her application for a disability pension under the Pension Plan came before the Trustees' Pension Approval Committee at its regular meeting on March 16, 1976 after Brug had satisfied all the requirements for a disability pension and had retired; that the Committee deferred action on Brug's application; that the Trustees thereafter rescinded the Pension Plan provision which entitled Brug to participate in the Pension Plan and summarily denied Brug's application on the basis of the Trustees' modification of the Pension Plan. Brug alleged that the deferral and denial of her application for a pension was arbitrary, discriminatory and capricious and in violation of the governing instruments of the Pension Plan and Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).

The case was tried by the District Court sitting without a jury on March 26, 27 and 28, 1980. On June 9, 1980, the Court issued an order denying Brug's claims for relief in their entirety. Judgment was entered the same day.

On June 18, 1980, Brug filed a notice of appeal. The appeal was argued before the United States Court of Appeals for the Ninth Circuit on December 15, 1981. On February 12, 1982 the Court of Appeals issued an opinion

reversing the judgment of the District Court. The Court of Appeals held that the Trustees did not have the authority under the Pension Plan and Trust Agreement to apply amended pension eligibility provisions so as to deny Brug pension benefits that had vested before the Trustees amended the Plan.

On April 16, 1982 the Court of Appeals issued an order denying the Pension Plan's petition for rehearing and suggestion for rehearing *en banc*.

IV
STATEMENT OF THE FACTS

A. Employees Of The Carpenters Union Participate In The Pension Plan Pursuant To Express Provisions Of The Trust Agreement

The Carpenters Pension Trust Fund for Northern California is a jointly administered employee benefit trust created by a Trust Agreement executed in 1957 by various contractors associations and Carpenters Union District Councils and Locals. The Trust Agreement, as amended December 1, 1965, expressly allows Local Unions, District Councils and other labor organizations affiliated with the Carpenters Union to make pension contributions to the Trust Fund on behalf of their employees. *The Trust Agreement does not restrict or limit in any way the categories or classifications of Union employees for whom such pension contributions may be made.*

The Pension Plan mirrors the Trust Agreement in providing, at Article II, for contributions to the Pension Trust Fund by any Local Union or District Council on behalf of its employees, without limiting the classifications of employees for whom contributions may be made.

Pursuant to the foregoing provisions of the Trust Agreement and Pension Plan, officers and business agents of the Carpenters Union have had pension contributions made to the Pension Plan on their behalf since 1965. In addition, various other individuals employed by Union affiliates or related labor organizations have participated in the Pension Plan, including, apparently, at least one office clerical employee. Prior to June 1, 1975, however, Local Unions and District Councils were not *required* to contribute to the Pension Trust Fund on behalf of their office clerical employees.

In 1974, following an audit, the Internal Revenue Service advised the Trustees that contributions to the Pension Plan by certain Local Unions and District Councils failed to comply with the coverage requirements of the Internal Revenue Code and discriminated in favor of highly compensated officers and business agents and against office clericals employed by the Union, some of whom had no retirement program at all. Union business agents, fearing disqualification of their pension contributions, urged the Trustees to include the office clericals in the Pension Plan. At the same time the business agents advised the Trustees that they did not want to have to pay pension contributions to the Trust Fund to fund the office clericals' past service with the Union back to 1957, when the Pension Plan was established.

While the possibility of amending the Plan to require inclusion of clerical employees of any Local Union or District Council that contributed for its officers and other employees was being discussed, the Trustees directed their financial consultants to prepare a survey of pension cov-

erage for clerical employees of Carpenters Local Unions and District Councils in Northern California. The survey confirmed that some office clerical employees of the Union had no pension plan at all, nor any retirement benefits; others had some pension coverage under a collective bargaining agreement between the Office Employees Union, as their collective bargaining representative, and the Carpenters Union, as their employer. The survey revealed that there were between 70 and 80 office clericals employed by the Union in Northern California, the number potentially affected by a Plan amendment requiring clericals' participation.[1]

The Trustees then asked their actuaries for a report on the financial impact of covering the clericals and granting them past service credit—for which no contributions would be made—for their years of service with the Union prior to the effective date of their coverage. The actuaries reported that the financial impact on the Trust Fund would be "minimal."

After months of discussions, the Trustees, at a meeting on August 26, 1975, attended by cocounsel and the actuaries, formally adopted Amendment 13 to the Pension Plan. Amendment 13 was drafted by co-counsel to the Trustees, who had advised the Trustees that the office clericals ought to be covered under the Pension Plan, in view of the probable insistence by the IRS that office clericals be given pension parity with full-time officers of the Union.

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[1]Some 40,000 to 50,000 Carpenters working under collective bargaining agreements participated in the Pension Plan, and 5,000 employers contributed.

Amendment 13 made minor modifications in certain provisions of the Pension Plan, but restated unchanged the operative definitions of the terms "Employee," "Individual Employer," and "Covered Employment," which already allowed for pension contributions to the Trust Fund on behalf of Union employees *without restriction*. Although clerical employees were not expressly mentioned in Amendment 13, the avowed purpose of the Amendment was to require their inclusion where contributions were made for other employees of Local Unions, District Councils and the State Council of Carpenters and thus to create a "parity" of pension coverage as between clericals and other employees of the Union.

The Trustees' rules and regulations implementing Amendment 13 granted the clericals past service credit for employment with the Union prior to June 1, 1975, and required Local Unions, District Councils and the State Council of Carpenters to contribute to the Pension Plan for the clericals' hours of service after June 1, 1975. The rules and regulations also provided for vesting of benefits under the Plan after 350 hours of credited service in the twelve months following June 1, 1975 and required that pension applications be filed with the Trustees at least one month in advance of the first month for which benefits were payable.

On September 12, 1975, the Trustees advised all Local Unions, District Councils and the State Council of Carpenters in writing that if they wished to contribute to the Pension Plan for any of their employees or officers, they would be required to contribute for *all* full-time employees and officers, retroactive to June 1, 1975.

Following adoption of Amendment 13, five office clerical employees employed by various Local Unions, a District Council and the State Council of Carpenters applied for and were granted retirement benefits under the Pension Plan. One of these individuals is now deceased. The other four are still receiving pension benefits under the Plan.

B. The Trustees Deny Brug's Pension Application On The Basis Of A Plan Amendment Adopted After Brug Applied And Qualified For Pension Benefits

Mary Brug was employed by Carpenters Union Local 22 from March 4, 1963 to January 31, 1976 as a stenographer. Like the other clerical employees of the Union who applied for and were granted retirement benefits under the Plan, Brug was a member of the Office Employees Union and worked under a collective bargaining agreement between that Union and her employer, Carpenters Local 22.

In September, 1975 Brug learned that clerical employees of Carpenters Local Unions and District Councils were now covered under the Carpenters Pension Plan and that Local 22 had started making monthly contributions to the Pension Trust Fund on her behalf, effective June 1, 1975. She also learned that she would be given credit under the Plan for her employment with the Union prior to June 1, 1975.

On November 13, 1975 Brug, who had been thinking about retiring, went to the Carpenters Trust Fund office at 995 Market Street in San Francisco and filled out a pension application with the assistance of Michael Pearce, supervisor of the Pension Department of the Carpenters

Trust Funds administrative office in San Francisco. Pearce told Brug that she would qualify for an early retirement pension effective January 1, 1976.

A few days later Pearce advised Brug that she did not qualify for an early retirement pension because she did not have sufficient years of service, or for a normal pension, since she was not yet 65 years old. Pearce stated that in view of her health problems, however, Brug would qualify for a disability pension if she first qualified for Social Security disability benefits.

On November 19, 1975, Brug applied for Social Security disability benefits. On February 10, 1976 she was notified that she had been awarded Social Security disability benefits. She immediately notified Pearce, who stated that Brug "was in the ball game," that she was o.k., and that there was nothing to worry about.

On February 11, 1976 Brug called Pearce and asked him whether she would be required to fill out another pension application, since her original application indicated that she was applying for an early retirement pension. Pearce assured her that it was not necessary to fill out another application. He told her that "everything was in order," that she had fulfilled all the requirements for eligibility for a disability pension in the amount of $255 per month, effective February 1, 1976. Pearce assured Brug that her pension application only had to be approved by the Pension Approval Committee, which was "automatic."

After receiving Brug's evidence of her qualification for Social Security disability benefits, Mr. Pearce and his staff of pension analysts reviewed Brug's application in light of the eligibility requirements of the Pension Plan and

placed it on a list of applications to be presented to the Trustees' Pension Approval Committee for approval at their March 16, 1976 meeting.

The Pension Approval Committee, composed of two Employer and two Union Trustees, meets bimonthly to act on pension applications. At its March 16, 1976 meeting the Pension Approval Committee considered all pension applications on the agenda except Brug's. It approved all pension applications presented to it with a recommendation for approval from Pearce's department except for Brug's. There was no discussion whatsoever with respect to Brug's application. Rather, Union Trustee John Rebeiro, Chairman of the Pension Approval Committee at that time, moved to recess the meeting without considering Brug's application at all, in order to allow time to convene the full Board of Trustees to rescind Amendment 13. The Trustees would then have a basis on which to deny Brug's application. The members of the Pension Approval Committee had no doubt at that time that Brug was entitled to a disability pension under the rules then in existence. Under Amendment 13 Brug qualified for a pension. Further, the Trustees knew that granting her benefits would not have impaired the assets of the Trust Fund.

Immediately after the March 16, 1976 Pension Approval Committee meeting, the Trustees scheduled a special meeting of the full Board to reconsider and rescind Amendment 13 before Brug's pension application was reviewed. Pursuant to notice the full Board met specially on March 23, 1976. The new Union cocounsel to the Trustees announced that Amendment 13 was illegal. The Trustees then voted not to accept any further contributions on behalf of clerical

employees, to refund contributions that had been made and to advise contributing unions that clerical employees would not be covered under the Plan. The Trustees decided not to challenge the pensions of the five office clerical employees who had already been granted retirement benefits.

Immediately after the special meeting of the full Board of Trustees on March 23, 1976, the Pension Approval Committee met again. Solely on the basis of the action of the full Board effectively rescinding Amendment 13 that same day, the Trustees denied Brug's pension application.

Following notification that the Trustees had denied her pension application, Brug filed an appeal. The appeal was rejected by the Trustees' Appeals Committee on August 24, 1976.

V

REASONS WHY THE PETITION SHOULD BE DENIED

A. There Is No Conflict Between The Decision Below And This Court's Decision In Arroyo v. United States, 359 U.S. 419 (1959) Or The California Court of Appeal's Decision In French v. Construction Laborers Pension Trust, 44 Cal.App.3d 479 (1975)

The Pension Plan predicates its Petition upon the premise that Amendment 13 to the Pension Plan, which provided for participation of clerical employees such as Brug, violated the underlying Trust Agreement, and that the Court of Appeals' decision requiring payment of pension benefits to Brug constitutes an order to the Trustees to spend Trust assets without proper authority.

The Pension Plan's contention is without merit. The Court of Appeals considered and rejected the same argu-

ment below, concluding that Article I, Section 4 of the Trust Agreement, defining covered employees, is "clear and unambiguous." Article I, Section 4, provides as follows:

> The term 'Employee' shall also include employees of Local Unions and District Councils, and employees of labor councils and other labor organizations with which a Local Union or District Council is affiliated, on whose behalf contributions are made to the Pension Fund pursuant to regulations adopted by the Board of Trustees; provided the inclusion of any said employees is not a violation of any existing law or regulation.

The Pension Plan contains an identical provision.

As the Court of Appeals observed, there is no contention in this case that inclusion of the clerical employees violated any existing law or regulation.

Thus, the Trust instruments do not exclude clerical employees of the Union from participation in the Pension Plan. On the contrary, they allow participation of employees of the Carpenters Union, without restriction to Union business representatives and officers. Therefore, by allowing clerical employees such as Brug to participate, the Trustees did not expend the assets of the Trust Fund for purposes other than those for which the Fund was established, nor did the Trustees purport to alter, change or modify the Trust Agreement without the concurrence of the Trustors. The Trustees did not go beyond the bounds of the original Trust Agreement, but strictly adhered to the coverage provisions of that instrument in adopting Amendment 13. Accordingly, the Court of Appeals' decision protecting Brug's vested rights under Amendment 13 is not in conflict with this Court's decision in *Arroyo v. United States*, 359 U.S. 419 (1959), or the California Court

of Appeal's decision in *French v. Construction Laborers Pension Trust*, 44 Cal.App.3d 479 (1975).

B. The Decision Of The Court Of Appeals Does Not Conflict With Established Case Law In The Ninth Or Other Circuit Courts Of Appeals Concerning The Trustees' Discretionary Powers.

The Trust Agreement includes in the definition of employees covered under the Plan employees of the Union *without restriction*. As the Court of Appeals held, that language is clear and unambiguous. Accordingly, authorities cited by the Pension Plan for the proposition that Plan Trustees may decide between conflicting interpretations of the Plan, so long as their interpretation is not arbitrary and capricious, are inapposite. As the Court of Appeals held, the Trustees had the authority under the Plan to rescind Amendment 13, but they could not apply their action retroactively, to deny pension benefits to a Plan participant whose rights had vested in the meantime.[3]

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[3]The Pension Plan's illegality argument is further undercut by its own treatment of the other clerical employees who applied for and were granted pension benefits. Estoppel arguments notwithstanding, if Amendment 13 were not authorized by the Trust Agreement, the Trustees would have been *required* to terminate the pensions of the other clericals. *Aitken v. I. P. & G. C. U.-Employer Ret. Fund*, 604 F.2d 1261 (9th Cir. 1979); *Moglia v. Geoghegan*, 403 F.2d 110, 117 (2d Cir. 1968), *cert. den.*, 394 U.S. 919 (1969); *French v. Construction Laborers Pension Trust, supra*. In fact those other former clerical employees of the Union continue to draw pension benefits from the Pension Plan, a tacit admission by the Pension Plan that Amendment 13 was properly adopted.

C. The Decision Of The Court Of Appeals Does Not Conflict With This Court's Decision In United Mine Workers of America Health And Retirement Funds v. Robbinson, 102 S.Ct. 1226 (1982)

The Pension Plan argues that the Court of Appeals' decision is inconsistent with a *subsequent* decision of this Court, *United Mine Workers of America Health and Retirement Funds v. Robinson*, 102 S.Ct. 1226 (1982), in that the Trustees' denial of Brug's pension application constituted permissible discrimination in favor of bargaining unit employees as required by the Trust Agreement. The only problem with the Pension Plan's argument is that, once again, it tries to read into the Trust Agreement restrictions which do not exist. Employees of the Union are authorized to participate in the Pension Plan, regardless of classification. Brug was an employee of the Union. The Trust Agreement not only did not exclude her but affirmatively allowed her participation in the Plan.

D. The Decision Of The Court Of Appeals Does Not Conflict With The District Of Columbia Circuit's Decision In Pete v. United Mine Workers Of America Welfare And Retirement Fund, 517 F.2d 1275 (D.C.Cir. 1975)

Pete v. United Mine Workers of America Welfare and Retirement Fund, 517 F.2d 1275 (D.C.Cir. 1975), addressed the issue of whether a pension plan provision requiring a certain period of contributory employment as a condition of eligibility for retirement benefits under the plan was arbitrary and capricious. Unlike this case, Pete did not concern *retroactive application* of an eligibility requirement to deny pension benefits to a plan participant who qualified for a pension before the requirement was adopted.

Here, as the Court of Appeals held, the Trustees had the discretion to grant benefits to clerical employees of the Union based upon their employment by the Union prior to the date that contributions to the Pension Plan for clerical employees commenced.

> The Pension Plan provided for pension credit for service before the designated contribution date for other employees as well. It is the nature of a pension plan such as this one to provide benefits for periods of service for which no contributions are specifically made or required. This plan provided such benefits, including death benefits, disability pensions, credit for past service, credit for service in the armed forces, and partial pensions based on credited service with other related plans. This type of benefit has to be based upon actuarial probabilities, not specific contributions for specific employees.

(Appendix "A" to the Petition, pp. 21-22.)

Moreover, the Trustees, in consulting with their actuaries prior to adopting Amendment 13, were advised that granting past service credit to the office clericals, including those who had long years of service and were near retirement, would have a *minimal* impact on the Trust Fund.

This is not a case where the Court below in any sense attempted to second-guess the Trustees' adoption of reasonable eligibility rules; the Court of Appeals held that the Trustees had the discretion both to adopt and to rescind Amendment 13. What is at issue is the *manner* in which the Trustees chose to apply their action. The Court of Appeals properly held that the Trustees acted arbi-

trarily and capriciously in denying Brug a pension on the basis of a modification of the Pension Plan eligibility rules enacted *after* Brug applied for benefits and met the eligibility requirements then in place. Its decision is correct and consistent with other reasoned decisions of the Courts of Appeals. *See, e.g., Burroughs v. Bd. of Trustees of Pension Trust, Etc.*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. den.*, 429 U.S. 1096 (1977); *Danti v. Lewis*, 312 F.2d 345, 349 (D.C.Cir. 1962); *Kiser v. Huge*, 517 F.2d 1237, 1246 (D.C.Cir. 1974); *Stacey v. Combs*, 671 F.2d 602, 606 (D.C.Cir. 1982).

VI

CONCLUSION

The Pension Plan has not suggested any substantial basis for this Court's review of the decision below, and in fact none exists. The Petition should therefore be denied.

Dated: August 13, 1982

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